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DEPARTMENT OF THE INTERIOR

Office of the Secretary

43 CFR Part 11

[Docket No. DOI-2018-0006;

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RIN 1090-AB17

Natural Resource Damages for Hazardous Substances

AGENCY: Office of Restoration and Damage Assessment, Interior.

ACTION: Advance notice of proposed rulemaking; request for public comment.

SUMMARY: The Office of Restoration and Damage Assessment (ORDA) is seeking comments and suggestions from State, Tribal, and Federal natural resource co-trustees, other affected parties, and the interested public on whether revisions to the regulations for conducting natural resource damage assessments and restoration (NRDAR) for hazardous substance releases are needed, and if so, what specific revisions should be considered.

DATES: We will accept comments through [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE *FEDERAL REGISTER*].

ADDRESSES: You may submit comments to ORDA on this ANPRM by any of the following methods. Please reference the Regulation Identifier Number (RIN) DOI-2018-0006 in your comments.

- *Electronically:* Go to <http://www.regulations.gov>. In the “Search” box enter “DOI-2018-0006.” Follow the instructions to submit public comments. We will post all comments.

- Hand deliver or mail comments to the Office of Restoration and Damage Assessment, U.S. Department of the Interior, 1849 C Street Northwest, Mail Stop/Room 5538, Washington, DC 20240;

FOR FURTHER INFORMATION CONTACT: Steve Glomb, Director, Office of Restoration and Damage Assessment at (202) 208-4863 or email to steve_glomb@ios.doi.gov.

SUPPLEMENTARY INFORMATION: The regulations provide procedures that State, Tribal, and Federal natural resource co-trustees may use to evaluate the need for and means of restoring, replacing, or acquiring the equivalent of public natural resources that are injured or destroyed because of releases of hazardous substances into the environment. The Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA) -- which authorizes natural resource damage claims by States, federally recognized Indian Tribes, and the Federal government -- specifies that the regulations are optional, but if the State, Tribal, and Federal governments (described as natural resource “co-trustees” by CERCLA) utilize them, they are entitled to a “rebuttable presumption” on their claim in any subsequent legal proceeding. This notice seeks comment and suggestions in response to the CERCLA biennial review requirement and Executive Order 13777 (February 24, 2017), which directed the Department of the Interior (DOI) and other Federal agencies to establish Regulatory Reform Task Forces to evaluate existing regulations and make recommendations regarding repeal, replacement, or modification, consistent with applicable law.

Background

CERCLA authorizes the Federal government, States, and federally recognized Indian Tribes to act as “trustees” on behalf of the public, for the purpose of bringing claims for injury to natural resources injured or destroyed by hazardous substance releases. Such claims are not fines or penalties, and the measure of damages is calculated by the cost to restore or replace the injured or destroyed natural resources. Trustees may also recover compensation for services the resources would have provided to the public pending restoration, along with the reasonable cost of assessing injury and determining appropriate restoration. The statute requires trustees to spend restoration recoveries “only to restore, replace, or acquire the equivalent” of injured natural resources pursuant to a publicly reviewed restoration plan.

Section 301(c) of CERCLA requires the promulgation of regulations to guide natural resource damage assessment and restoration. The statute explicitly provides that the regulations are not mandatory, but if State, Tribal, or Federal trustees conduct an assessment in accordance with the regulations, they would receive a “rebuttable presumption” for their claim in any subsequent administrative or judicial proceeding. The Department of the Interior (DOI) was designated by the President to develop the regulations currently in effect at 43 CFR part 11.

DOI previously developed two types of NRDAR regulations (as specified by CERCLA). Standard procedures for simplified assessments requiring minimal field observations (the Type A Rule); and site-specific procedures for detailed assessment in individual cases (the Type B Rule). The CERCLA NRDAR Regulations were last revised in 2008. These revisions to the Type B Rule emphasized natural resource

restoration over litigation and monetary damages, made technical corrections to procedural timing inconsistencies, and responded to two court decisions addressing previous versions of the regulations: *State of Ohio v. U.S. Department of the Interior*, 880 F.2d 432 (D.C. Cir. 1989) (*Ohio v. Interior*); and *Kennecott Utah Copper Corp. v. U.S. Department of the Interior*, 88 F.3d 1191 (D.C. Cir. 1996) (*Kennecott v. Interior*).

The 2008 revisions were based on the report of a committee convened by DOI under the Federal Advisory Committee Act (FACA) to make recommendations on improving NRDAR practice. The committee was comprised of representatives from States, Tribes, Federal agencies, industrial corporations, industry consultants and attorneys, local and national non-governmental organizations, and academics. Unlike previous iterations of the NRDAR regulations, the final regulatory revisions based on the FACA Committee report were not challenged by States, Tribes, industry or environmental groups.

Description of Information Requested

We are interested in comments or suggestions that improve the efficiency and cost effectiveness of the NRDAR process. An internal biennial review of the CERCLA NRDAR regulations identified some remaining issues from the NRDAR FACA Committee Report that could be addressed, and NRDAR practice issues that have developed or progressed since the last revision of the regulations. DOI is particularly interested in comments and suggestions related to these issues, outlined below. We also welcome comments and suggestions on any other aspect of the regulations that trustees, stakeholders, and the general public would like us to consider.

Simplification and “Plain Language”

With the exceptions of the provision of the Type B Regulations that were revised in 2008, the CERCLA NRDAR regulations are arguably complicated, overly prescriptive, repetitive, and dense – particularly when compared to the Oil Pollution Act (OPA) NRDAR Rule promulgated by the National Oceanic and Atmospheric Administration at 15 CFR part 990. A number of stakeholders have suggested that DOI should consider a comprehensive “plain English” revision to the CERCLA NRDAR Regulations that closely aligns with the structure of the existing OPA NRDAR Regulations.

Type A Regulations

The Type A Regulations were designed to result in efficient, cost effective, standardized assessments. It has been challenging, however, to develop workable Type A Regulations that are streamlined and utilize minimal actual field observations but are still relevant and reliable enough to be entitled to a rebuttable presumption of correctness. Accordingly, DOI is seeking comments or suggestions regarding revision to and utilization of the CERCLA NRDAR Type A Regulations.

Early Emphasis on Restoration over Damages

The NRDAR FACA Committee Report recommended that DOI could encourage a restoration focus and negotiated agreements by revising the regulations to encourage early scoping of restoration opportunities at NRDAR sites. DOI is interested in any additional comments or suggestions on where specifically in the assessment process restoration scoping may be cost effective and appropriate and how that could best be addressed in the regulations.

Procedures to Further Encourage Negotiated Settlements and Early Restoration

Since the last revision of CERCLA NRDAR Regulations, a number of matters have utilized partial negotiated settlements early in the assessment process to cost effectively resolve discrete NRDAR claims and re-inforce an overall restoration focus for ultimate comprehensive resolution. However, the current regulations offer little guidance on how to align early restoration settlements with existing statutory and regulatory requirements for assessment and restoration planning.

Advance Restoration and Restoration Banking

Restoration “banking” and advance restoration – where restoration is undertaken in anticipation of marketing portions of such restoration to responsible parties to address natural resource injury caused by releases of hazardous substances – has been considered at a number of sites since the last revision of the CERCLA NRDAR regulations. Some States (such as Louisiana) have enacted specific statutory provisions and promulgated regulations on NRDAR banking. The existing CERCLA NRDAR regulations do not provide any guidance on the use of advance restoration and restoration banking techniques.

National Environmental Policy Act (NEPA) Compliance

The NRDAR FACA Committee Report encouraged DOI to adopt Department-wide categorical exclusions from NEPA as appropriate and to ensure that compliance with NEPA requirements occurs concurrently with NRDAR restoration planning. DOI is interested in comments or suggestions whether that would best be addressed in the NRDAR regulations, NEPA regulations, or in Departmental guidance.

Public Comment Procedures

DOI is not obligated to consider comments that we receive after the close of the comment period for this ANPRM, or comments that are delivered to an address other than those listed in this notice. After the comment period for this ANPRM closes, DOI will review all comment submissions. Upon consideration, DOI may publish a notice of proposed rulemaking.

We are particularly interested in receiving comments and suggestions about the topics identified in the *Description of Information Requested* section. Written comments that are specific, explain the rationale for the comment or suggestion, address the issues outlined in this notice, and where possible, refer to specific statutes, existing regulations, case law, or NRDAR practices are most useful.

Before including your address, phone number, email address or other personal identifying information in your comment, you should be aware that your entire comment—including your personal identifying information – might be made publicly available at any time. While you may ask us in your comment to withhold your personal identifying information from public review we cannot guarantee that we will do so.

Authority:

42 U.S.C. 9601, secs. 104,107,111(I), 122

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